Ann. Cas. 1912D 1114 (irrigation canals). Such a rule of public policy seems necessary in view of the fact that public easements are rarely excepted and parties seldom regard their existence on the land as constituting a breach of the covenant against incumbrances.

CORPORATIONS—LIABILITY OF DIRECTORS FOR SECRET PROFITS.—By a concerted scheme of all the defendants, directors of a corporation, they sold certain mineral lands to the corporation at a price greatly in excess of their intrinsic market value, taking in payment thereof stock of the corporation, thereby gaining control of the corporation and preventing any disclosure to the stockholders of the misappropriation of the company's assets. Later the defendants organized another corporation which they also controlled, and to which all the assets, good will, patents, choses in action, personal property, and business of the first corporation were transferred, the transfer being effected on the basis of an exchange share for share of the stock of the first corporation for the stock of the second corporation. The second corporation later elected a disinterested board of directors and discovered the fraud and now sues to recover the secret profits. The defendants demurred to the bill. *Held,* that the demurrer should be sustained. *United Zinc Companies* v. *Harwood et al.* (Mass. 1914), 103 N. E. 1037.

The defendants were guilty of a fraud against the first corporation for which it could either have rescinded the sale, *Ginn* v. *Almy,* 212 Mass. 486; *Cumberland Coal & Iron Co.* v. *Parish,* 42 Md. 598; *Pope* v. *Valley City Salt Co.,* 25 W. Va. 789, or sued for the secret profits, *Haywood* v. *Leeson,* 176 Mass. 310, 39 L. R. A. 725. But the suit was not brought by the old corporation. A new corporation was created. There was no attempt to consolidate and there was no statute permitting a consolidation. Had there been, the new corporation would have succeeded to all the rights, privileges, and franchises of the old and could have sued on rights of action existing in favor of the old, *Zimmer* v. *State,* 30 Ark. 677; *Meade* v. *N. Y., H. & M. Ry. Co.,* 45 Conn. 199; *Chicago, R. I. & P. Ry. Co.* v. *Moffitt,* 75 Ill. 524; *Miller* v. *Lanchester,* 45 Tenn. 514. But the old corporation still exists. Even though shorn of all its assets, it still retains its corporate entity, *State* v. *Bank of Maryland,* 6 Md. 205; *Price* v. *Holcombe,* 89 Iowa 123, and the mere right to litigate for a fraud is not assignable either in law or equity. It is not a salable asset nor such an interest in property to which the right to sue passes as incidental, *Cutter* v. *Hamlen,* 147 Mass. 471, 1 L. R. A. 429; *Emmons* v. *Barton,* 109 Cal. 662; *Life Ins. Co.* v. *Fuller,* 61 Conn. 252; *Dayton* v. *Fargo,* 45 Mich. 153; *Graham* v. *R. R. Co.,* 102 U. S. 148. The only way therefore in which the defendants can be reached is by bringing the suit in the name of the old corporation, and the demurrer was therefore properly sustained.

CORPORATIONS—WHO CAN SUE ON MORTGAGE BONDS.—Plaintiff owned mortgage bonds executed by defendant corporation, containing a clause providing for sale, suit, or entry upon and management of the mortgaged property by the trustee, after default in payment, on request of one-third of

the bond holders. Defendant made default in payment, and plaintiff, without any request having been made upon the trustee, sues to recover on the past due bonds. *Held,* that the common-law right to sue upon the bonds is not affected by the remedy provided in the mortgage given for their security, unless the provisions of the mortgage exclude such right in express terms or by necessary implication. *Fleming* v. *Fairmont & M. R. Co. et al.* (W. Va. 1913), 79 S. E. 826.

The argument against allowing the recovery in this action, viz., that it would prejudice the rights of the other bond-holders, cannot be sustained, for any lien that the plaintiff might acquire on the defendant's property must necessarily be secondary to the mortgage. If execution is had upon the judgment, the levy must be upon property other than that secured by the mortgage, thereby retaining to the other bond-holders an equal share in the mortgaged property, *Kimber* v. *Gunnel,* 126 Fed. 136; *Hospital* v. *Library Co.,* 189 Pa. 266. The other bond-holders not being embarrassed, there seems to be no reason why the remedy provided in the mortgage should not be held to be cumulative and not exclusive of the common-law right, *Dow* v. *Memphis, etc., R. Co.,* 124 U. S. 652; *Manning* v. *Norfolk & So. R. Co.,* 29 Fed. 839; *Wheelwright* v. *St. Louis, N. O. & O. Canal Transp. Co.,* 56 Fed. 164; *Phila. & Balt. Cent. R. Co.* v. *Johnson,* 54 Pa. 127; *Commonwealth* v. *Susquehanna, etc., R. Co.,* 122 Pa. St. 306; except where the whole scheme shows that the intention was that the bond-holders should look exclusively to the rights given in the mortgage, *Batchelder* v. *Council Grove Water Co.,* 131 N. Y. 42, 29 N. E. 801. But where the bond-holder sues to foreclose the mortgage, a different rule applies, for it would authorize an individual bond-holder to disturb the security of the other bond-holders, *Ashhurst* v. *Montour Iron Co.,* 35 Pa. St. 30; *Bowling Green Trust Co.* v. *Va. Passenger & Trust Co.,* 164 Fed. 753; *Batchelder* v. *Council Grove Water Co., supra.* But the bond-holders stand in much the same relation to the trustee as the stockholders of a corporation do to the corporation, and where it can be shown that the trustee neglects or refuses to act except on unjustifiable terms, or that he is incurably insane and the financial condition of the company is in such a condition that an immediate foreclosure is necessary to protect the interests of the bond-holders, then the individual bond-holder can foreclose for the benefit of all the bond-holders, *Owens* v. *Ohio, etc., R. Co.,* 20 Fed. 10; *Beekman* v. *Hudson River, etc., R. Co.,* 35 Fed. 3; *Consolidated Water Co.* v. *City of San Diego,* 89 Fed. 272; *Schultz* v. *Van Doren,* 65 N. J. Eq. 764; *Ettlinger* v. *Persian Rug & Carpet Co.,* 66 Hun. (N. Y.) 94; but such proof must be clear and convincing, *Beebe* v. *Richmond Light, Heat & Power Co.,* 35 N. Y. Supp. 1. The principal case, however, was not for foreclosure but merely an action at law to recover the value of the past due bonds. The decision was therefore correct.

COURTS—CONFERRING JURISDICTION BY CONSENT.—On motion of the defendant, the trial court entered an order of dismissal for want of prosecution; after adjournment, by agreement of both parties, it re-instated the